

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TERESA SANDERSON**

Claimant

VS.

**EXCEL CORPORATION**

Respondent

Self-Insured

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Docket No. 213,424

**ORDER**

Claimant appealed the Award dated February 10, 1998, entered by Administrative Law Judge Kenneth S. Johnson. The Appeals Board heard oral argument on August 26, 1998.

**APPEARANCES**

Chris A. Clements of Wichita, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

After finding that claimant was terminated by respondent for cause, Judge Johnson denied claimant's request for a work disability. Also, the Judge subtracted 3.6 percent for preexisting impairment from claimant's present 11 percent whole body functional impairment and awarded her a 7.4 percent permanent partial general disability.

Claimant contends the Judge erred by denying her a work disability. Claimant argues her poor work performance, the reason given for her termination, was caused by her injury. Respondent, on the other hand, contends claimant's termination was not related to her injury.

The only issue on this appeal is the nature and extent of claimant's injury and disability.

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds:

- (1) Teresa Sanderson began working for Excel Corporation, a meat packing company, as a meat trimmer in November 1994. In 1995, Ms. Sanderson began experiencing symptoms in her hands, arms, and shoulders, which she reported to the company nurse. Eventually, Ms. Sanderson was diagnosed as having biceps and rotator cuff tendinitis.
- (2) The parties stipulated that Ms. Sanderson sustained personal injury by accident arising out of and in the course of employment with Excel. The parties selected December 1, 1995, as the accident date for the period of injury in question.
- (3) The company physician, Pedro A. Murati, M.D., began treating Ms. Sanderson in 1995 and eventually released her to return to work without restrictions in February 1996. She then returned to her regular job trimming forequarters. She remained in that position until she was transferred to removing "sweet bread," which required her to cut fat and waste from necks.
- (4) In March 1996, Excel suspended Ms. Sanderson for three days for poor job performance. On that occasion, Ms. Sanderson did not properly trim fecal contamination causing the meat to fail government inspection, which required carcasses to be pulled from the sales cooler and be retrimmed. Before that suspension, however, Ms. Sanderson had received both verbal and written warnings for poor quality of work. The written warning which was issued in September 1995 was also for failing to properly trim meat.
- (5) On May 9, 1996, Excel terminated Ms. Sanderson for poor job performance.
- (6) Although Ms. Sanderson now contends she experienced difficulties with her fingers locking and other problems with her hands and arms when she returned to her regular job duties in February 1996, she neither asked for nor sought additional medical treatment from either the on-site company nurses or the company doctor. Further, when she was terminated, she did not advise Excel that she was having problems doing her job due to her injuries.
- (7) Following her termination from Excel's employment, Ms. Sanderson obtained a job with a Dodge City newspaper where she now earns \$4.75 per hour and works either 21 or 22 hours per week. She started that job on July 5, 1997.
- (8) Before she began working for Excel, Ms. Sanderson had injured her left arm and shoulder while working for another meat packing company. In late 1991 and early 1992, board-certified orthopedic surgeon Robert L. Eyster, M.D., saw Ms. Sanderson for

symptoms in her neck, upper back, and left shoulder. The shoulder symptoms were consistent with bicep and rotator cuff tendinitis. In May 1992, Dr. Eyster issued work restrictions that would rule out both the trimming and sweet bread duties that she performed for Excel. According to Dr. Eyster, Ms. Sanderson had a 3.6 percent whole body functional impairment rating when he last saw her in May 1992. Dr. Eyster's opinion of functional impairment is persuasive.

(9) Judge Johnson averaged the 6 percent whole body functional impairment rating provided by orthopedic surgeon C. Reiff Brown, M.D., and the 16 percent rating provided by occupational medicine physician Preston Brent Koprivica, M.D., to find that Ms. Sanderson sustained an 11 percent whole body functional impairment as a result of the injury she sustained while working for Excel in 1995. The Appeals Board adopts both that analysis and finding.

#### **CONCLUSIONS OF LAW**

The Award should be affirmed.

(1) Because hers is an "unscheduled" injury, the formula for permanent partial disability benefits is governed by K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the workers is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

That statute, however, must be read in light of Foulk<sup>1</sup> and Copeland.<sup>2</sup> In Foulk, the Board held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes

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<sup>1</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944, P.2d 179 (1997).

of wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) Here, Ms. Sanderson was able to return to her regular job duties and was later terminated for reasons unrelated to her injury for activity tantamount to refusing to work. Therefore, Foulk is applicable and the comparable wages that Ms. Sanderson was earning after returning to her regular job duties in 1996 should be imputed for purposes of the permanent partial general disability formula. Therefore, Ms. Sanderson has no post-injury wage loss and her permanent partial general disability is limited to the 11 percent functional impairment less the preexisting impairment of 3.6 percent. Ms. Sanderson's permanent partial general disability Award should be based upon 7.4 percent as determined by the Judge.

(3) Ms. Sanderson contends her injury caused her poor job performance. That argument, however, is not supported by the record. Any symptoms that she experienced when she returned to work in February 1996 were not significant enough to prompt her to seek or request additional treatment with either the company nurse or doctor. When considering the entire record, the Appeals Board concludes that Ms. Sanderson's termination was not related to her 1995 injury. Further, she has failed to prove that she has lost the ability to perform any work that was not previously eliminated by her earlier injury and restrictions.

#### **AWARD**

**WHEREFORE**, the Appeals Board affirms the Award dated February 10, 1998, entered by Administrative Law Judge Kenneth S. Johnson.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Wichita, KS  
D. Shane Bangerter, Dodge City, KS  
Philip S. Harness, Director